COMPLIANCE BOARD OPINION NO. 01-7

May 8, 2001

Mr. Neil M. Ridgely

Mr. Jim Lee, Editor
Carroll County Times

The Open Meetings Compliance Board has considered your complaints concerning the closed meeting practices of the Carroll County Commissioners. For the reasons stated below, the Compliance Board finds as follows: Although the County Commissioners, in their role as the executive for Carroll County government, have some latitude to hold closed meetings that are simply not covered by the Open Meetings Act, in certain respects the Commissioners have overstepped the bounds of the "executive function" exclusion from the Act. This Opinion attempts to provide general guidance about compliance with the Act, under the difficult circumstances facing a public body with dual governmental functions.

I

Procedural History

By letter dated September 13, 2000, Mr. Ridgely complained that the County Commissioners violated the Open Meetings Act by holding an unlawfully closed meeting on the morning of September 11, 2000. Mr. Ridgely also attached to his complaint a list of 51 other meetings that were closed to the public and that evidenced, in Mr. Ridgely's view, a practice of noncompliance with the Act. By letter also dated September13, 2000, Mr. Lee filed a complaint with the Board, alleging that the County Commissioners had conducted an unlawfully closed meeting on September 12, 2000. Mr. Lee also asked for an overall clarification about the legal authority of the Commissioners to hold "executive sessions" (that is, sessions closed to the public without reference to an exception within the Open Meetings Act), as distinct from "closed sessions" (that is, sessions closed to the public based on a specific exception).

Thereafter, the County Attorney submitted a response providing information about the meetings identified in Messrs. Ridgely and Lee's complaints. Mr. Ridgely also supplemented his complaint by letter of October 31, 2000, with additional information that, in his view, evidenced a continuing practice of noncompliance by the County Commissioners. By letter of January 8, 2001, the Compliance Board,

having concluded that it was unable to reach a determination based on the written submissions, notified the parties of its decision to convene an informal conference concerning the pending complaints. *See* §10-502.5(e)(1) of the State Government Article, Maryland Code. At the conference, held on March 14, 2001, with Messrs. Ridgely and Lee and the County Commissioners in attendance, the parties explained their perspectives about Open Meetings Act compliance in Carroll County. As a result of the informal conference, by letter of April 5, 2001, the County Attorney supplemented the County's response concerning the Act's application to the types of meetings commonly held in Carroll County, with specific attention to the meetings itemized in the complaints about which the Compliance Board had raised questions.[1]

Particularly in light of the productive discussion at the informal conference, when all parties appeared to share a desire that past controversies about Open Meetings compliance be replaced by a focus on future "best practices," this opinion will largely devote itself to general guidance about the application of Open Meetings Act principles – in particular, the scope of the "executive function" exclusion – to the operations of the County Commissioners. Some of the specific meetings identified in the complaints will be used to illustrate application of the principles developed in this opinion, but the opinion will not catalog each and every cited meeting.[2] In this way, the Compliance Board hopes to contribute to an improved climate of openness in Carroll County.

II

The "Executive Function" Exclusion – Introduction

The most bedeviling aspect of Open Meetings Act compliance, especially in a local government like Carroll County that combines legislative and administrative responsibilities in a single body, is the interpretation of the Act's "executive function" exclusion. Under most circumstances, the Act does not apply to a public body like the Carroll County Commissioners "when it is carrying out an executive

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[1] By letter of January 8, 2001, the Compliance Board had identified 16 meetings which apparently were closed on the basis of the "executive function" exclusion but about which the Board had questions concerning that basis for closing.

[2] We did not receive enough information about the meeting initially cited by Mr. Ridgely, on the morning of September 11, 2000, to reach a conclusion about its legality. The meeting cited by Mr. Lee, on September 12, 2000, was described by the County Attorney as involving "implementation of [the Commissioners'] Strategic Plan . . . [and] as a team-building session." For the reasons set forth later in this opinion, implementation in specific circumstances of prior law or policy is generally an executive function for which a closed meeting is permissible.

function." §10-503(a)(1)(i).[3] If the Act does not apply as a result of this exclusion, the County Commissioners are ordinarily free to close a meeting for any reason, or indeed merely because they prefer to do so without any particular reason.[4] Conversely, if a meeting is not within the executive function exclusion and is otherwise covered by the Act, the Commissioners must open the meeting to public observation unless they identify, in a procedurally correct way, a basis for closing the meeting under one or more of the exceptions set out in §10-508(a) of the Act. *See* §10-505.

The executive function exclusion has occupied more of the Compliance Board's time than any other provision of the Act. In a long series of opinions, we have distilled our analysis into two distinct steps.[5] The first step is to answer this question: Does the matter to be discussed fall within the definition of any other "function" defined in the Act? If the answer is "yes," the executive function exclusion does *not* apply, because the definition of the term "executive function" in §10-502(d)(2) specifically rules out a matter within any of the Act's other defined functions. If the matter to be discussed is not encompassed by any other defined function, then a second question is presented: Does the matter involve "the administration of" a state or local law or a public body's rule, regulation, or bylaw? §10-502(d)(1). Here, the key issue is whether the matter under discussion involves the administration of an *existing* law or policy, as distinct from a step in the process of creating new law or policy. This is so because the terminology used by the General Assembly ("executive," "administration") unmistakably conveys the meaning of implementing laws or policies already in place.

The mere existence of prior law, however, does not mean that every action pursuant to that law is an "executive function." The action must be administrative in character, rather than policy-making, to qualify. Sometimes existing law grants a public body broad authority to act in an area. Under Article 25, §3(t), for example, the County Commissioners have authority "to formulate a building code or electrical code and to provide for inspections for and enforcement of such codes ...." When the Commissioners exercise this grant of authority "to formulate a building code," they are themselves engaged in a legislative, not an executive, function. Conversely, when the Commissioners exercise this grant of authority to enforce, in specific

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[3] There are exceptions to this general exclusion. See Part IV below.

[4] If some other law requires an open meeting, then, of course, the Commissioners must comply with that other law.

[5] Citations to the myriad of Compliance Board opinions that apply these analytical steps may be found in Office of the Maryland Attorney General, *Open Meetings Act Manual*, Appendix E, at E-8 through E-10 (2000).

circumstances, the code that they have previously formulated, they are engaged in an executive function.

The balance of this opinion will explore these concepts in more detail.

III

Distinguishing Legislative and Quasi-Legislative Functions

A. The Process of Policy Development

The Carroll County Commissioners are responsible for carrying out much of the "legislative function" of government in Carroll County.[6] A legislative function is, in pertinent part, "the process or act of approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy." §10-502(f)(1).[7] The County Commissioners also frequently are called upon to exercise a "quasi-legislative function" for the government of Carroll County. This term means the process or act of:

> (1) adopting, disapproving, amending, or repealing a rule, regulation, or bylaw that has the force of law...;
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> (2) approving, disapproving, or amending a budget; or
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> (3) approving, disapproving, or amending a contract.

§10-502(j).

When the Commissioners are engaged in either a legislative or quasi-legislative function, they perforce are not engaged in an executive function; the concepts are mutually exclusive. In some situations, a matter is so clearly a legislative or quasi-legislative function that no plausible assertion of the executive function can be made. For example, the County Attorney has acknowledged that, at

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[6] We need not discuss the extent to which the General Assembly, as distinct from the Commissioners, retains legislative responsibilities for Carroll County, which has not adopted a form of home rule. For our purposes, it suffices to say that, as a result of grants of authority by the General Assembly, the Commissioners do exercise various legislative powers.

[7] The definition of "legislative function" also includes the process or act of approving or disapproving an appointment, proposing or ratifying a constitution or constitutional amendment, and proposing or ratifying a charter or charter amendment. §10-502(f)(2), (3), and (4).

a meeting on August 24, 2000, the consideration of amendments to the County Personnel Ordinance was a legislative function and should have been open to the public. That the meeting was closed violated the Act.

To take another example, on July 25, 2000, the Commissioners met to discuss the construction management contract for the new Westminster High School. This discussion was surely part of "the process of approving, disapproving, or amending a contract." Therefore, the discussion involved a quasi-legislative function subject to the Act, not an executive function. As the County Attorney has acknowledged, "This meeting probably should either have occurred in open session or been closed under [§]10-502(a)(14) (allowing closing of a meeting before a contract is awarded or bids are open to discuss negotiating strategy or the contents, if public disclosure would adversely impact the body's ability to participate in the competitive bidding or proposal process). The minutes reflect the session was merely closed executive and the proper procedures to close under [§]10-508(a)(14) were not followed." The failure to close the meeting properly violated the Act.

In many other instances, however, the dividing line between a legislative or quasi-legislative function and an executive function is much harder to discern. On the one hand, the Court of Appeals has made it clear "that the Act applies, not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well as to all deliberations which proceed the actual legislative act or decision, unless authorized by [the Act] to be closed to the public." *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980). The Court thus indicated that "the process of" a legislative or quasi-legislative function includes "all deliberations," no matter how early in the process they occur or how tentative they are.

On the other hand, the Court of Appeals also has indicated that, in Carroll County, there is an executive function phase of budget preparation *preceding* "the process of ... approving ... a budget." In *Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595 (1982), the Court pointed out that, under a resolution governing the budget process, a budget officer and heads of county agencies would provide information and proposals to the County Commissioners, who would then develop the budget. Meetings at which these interchanges occurred were closed to the public. Carroll County argued that "the actual preparation of a budget is an executive function of county government different from the process of approval, disapproval, or amendment of a budget which the Act classifies as a quasi-legislative function." 293 Md. at 602. While the Court of Appeals decided the case in the County's favor on other grounds, the Court suggested that, had it reached this issue, it would have endorsed the distinction between budget preparation and budget approval under the scheme of government in Carroll County. 293 Md. at 605. We have applied the guidance of the Court of Appeals to a similar budget process in Wicomico County, Compliance Board Opinion 97-16 (December 2, 1997), *reprinted in* 1 *Official Opinions of the Open*

Meetings Compliance Board 261, and in Hagerstown. Compliance Board Opinion 99-10 (July 14, 1999), *reprinted in* 2 *Official Opinions of the Open Meetings Compliance Board* 64. We have also applied this reasoning to a closely analogous situation, in which the Ocean City Council by charter exercises supervisory authority over the town manager's preparation of compensation and benefit plans. Compliance Board Opinion 98-7 (September 11, 1998), *reprinted in* 2 *Official Opinions of the Open Meetings Compliance Board* 24.

Carroll County argues that the reasoning in *Landmark* applies beyond the budget process. That is, the Carroll County Attorney suggests that, in developing proposed legislation (or, presumably, other policy documents as well as contract proposals), agency heads and other key staff need to consult with the Commissioners to understand their preferences and receive policy direction, in much the same fashion as when they are beginning to prepare a budget. For example, the County Attorney noted that, at the meeting on August 31, 2000, "the staff, for the first time, informed the [Commissioners] of a problem with the Personnel Ordinance concerning performance review dates and requested permission to draft corrections.... [Agency heads] often seek approval from the [Commissioners] before undertaking a substantial project." In short, the County argues that much legislative or policy development occurs on the executive side of the Commissioners' role. Under this view, "seminal discussion" of agency heads' legislative and policy proposals is an executive function not subject to the Act.

We cannot accept this construction of the Act. To do so would create an enormous loophole not only in Carroll County but also in the other counties and municipalities where executive and legislative functions are combined in the same body. If these key aspects of the process were closed to public observation, the General Assembly's policy declaration that "citizens be allowed to observe ... *the deliberations* and decisions that the making of public policy involves" would be frustrated. §10-501(a)(2). Nor do we discern any clear or workable dividing line between the purported executive phase of legislative development and the legislative process itself. While we surely understand an agency head's desire not to invest substantial time in developing a legislative proposal without sounding out the Commissioners first, how can one say when the consultation process ends? If the first discussion with the Commissioners is an executive function, not a legislative one, as the County Attorney suggests, what about a second, follow-up discussion? Or a third? We find no objective basis on which to distinguish a supposed "executive side" discussion of proposed legislation with the County Commissioners from the early phase of the legislative process in Carroll County.

By contrast, the Court of Appeals *did* have an objective standard by which to discern the phases of the budget process at issue in *Landmark*. A resolution described that process in a manner that allowed the court to differentiate the executive phase of budget preparation from the quasi-legislative phase of budget

consideration. Similarly, municipal charter provisions delineated the respective phases of the compensation and pension development process at issue in Compliance Board Opinion No. 98-7. In short, we believe that the dictum in *Landmark* can be reconciled with the insistence in *Rogers* that the entire legislative process is covered by the Act only if *Landmark* is limited to a situation in which preexisting law clearly delineates the distinct phases of the process in question.

Such a preexisting, legally authoritative delineation of distinct phases, as far as we are aware, does not describe the legislative process in Carroll County. Hence, even the initial discussion of proposed legislation is a legislative function covered by the Act rather than an executive function excluded from it. It follows that, in the example of the August 31 presentation about the Personnel Ordinance cited above or a meeting on August 14, 2000, at which the Special Assistant asked the Commissioners whether they wished to consider amending the County Zoning Ordinance to add a sunset provision regarding variances and conditional uses, the meeting should have been open unless an exception in the Act had been properly invoked.

B. Policies Affecting County Employees

At a meeting on August 13, 2000, the County Commissioners considered a new "Business Communication Policy." In her description of the meeting based on the minutes of it, the County Attorney wrote that "it appears the Director who created the policy presented the concept of a Business Communications Policy and the draft to the Commissioners for the first time. However, since the Policy was fully drafted and signing time had been scheduled, the matter was arguably before the Board as a legislative function, if the executive versus legislative model is applied."

Nevertheless, the County Attorney contends that consideration of such a policy is not a legislative function:

> [I]t has been our practice not to regard a policy such as this as legislative at any stage, since it applies solely to County employees and is something that a County executive typically would adopt rather than a [county] Council. The statutory definition of "legislative function" uses the phrase "measure to set public policy." Unless the term "public" is construed as limiting the kinds of policies that constitute legislation, the word is surplusage.... We have traditionally regarded our policies as executive, because they pertain to only internal operations. When the Commissioners act with respect to regulatory measures involving the

> general public, they enact ordinances and resolutions, not policies.

We disagree with this construction of the Act. Policies that affect the performance of county employees or their dealings with the public are matters of public concern. That a policy may be addressed to county employees or affect them primarily does not negate a potentially significant secondary effect on the general public. After all, the taxpayers and citizens of Carroll County are ultimately the employers of county officials and employees. *See Office of the Governor v. Washington Post Co.*, 360 Md. 520, 538 n. 8 (2000).

We decline to give the term "public policy" an unduly narrow reading, one that would be inconsistent with the overall objectives of the Open Meetings Act. Moreover, the definition of "legislative function" refers to "a law *or other measure* to set public policy." With this broad formulation, it is immaterial whether a policy pronouncement takes the form of an ordinance or resolution.

We are also of the opinion that, even if the Commissioners' discussion of a general personnel policy were outside the definition of "legislative function," nevertheless the discussion would not be an executive function, because it does not involve the "administration" of existing law or policy. To be sure, as the County Attorney points out, the Commissioners were acting pursuant to an existing grant of authority. Under Article 25, §3(d)(1) and (f), the Commissioners are empowered to appoint and remove county officers and employees and to establish a merit system. This broad enabling authority, however, is not "administered," within the meaning and intent of the executive function exclusion, when the Commissioners consider across-the-board policies. Because *everything* that the Commissioners do is traceable back to some preexisting grant of authority, if subsequent policy making were considered "administration" of the enabling law, there would be nothing left of the Open Meetings Act. An enabling law like many of the provisions of Article 25, §3, can be "administered" so as to invoke the executive function exclusion if the action is an application of the law or a derivative policy to a specific case or set of circumstances, but an act of policy making itself is not an executive function.

Therefore, the meeting regarding the proposed Business Communication Policy should have been open unless an exception in the Act had been properly invoked. So should a portion of the meeting on July 27, 2000, concerning approval of a Sexual Harassment Policy.[8]

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[8] By contrast, a closed meeting on August 23, 2000, at which the Commissioners and Department Directors received sexual harassment training, was within the executive function as an implementation of preexisting policy. This August 23 meeting, the Compliance Board notes, was described by the County Attorney as a "Cabinet Meeting." If so, then this meeting was not of a "public body," because the Act excludes from the

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Staff Briefings

At a meeting on August 22, 2000, staff from the Department of Planning briefed the Commissioners on the facts of a rezoning petition that the Commissioners would shortly be hearing. A briefing of this kind is subject to the Act for two reasons: First, it concerns a zoning matter. Even if a discussion would otherwise fall within the "executive function" or other exclusion from the Act, the discussion nevertheless is covered by the Act if it concerns "a special exception, variance, conditional use, zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter." §10-503(b)(2).[9] Second, under the *Rogers* principle, even the initial steps in a process covered by the Act are themselves covered. As we wrote some years ago, "If a matter is required to be discussed in open session, every aspect of the public body's discussion, from the beginning to the end, must be in open session." Compliance Board Opinion 94-5 (July 29, 1994), *reprinted in* 1 *Official Opinions of the Open Meetings Compliance Board* 73.

The County Attorney requests that the Compliance Board "consider the briefing during [the August 22] meeting in a somewhat different light. In initial briefings such as this, staff seeks only to ensure the Commissioners are up to speed. Staff does nothing more than impart facts that the Commissioners already have in written form and discuss the logistics and process for conducting the hearing. The briefings are an expedient way to ensure the Commissioners are aware of the contents of their packets, which they cannot always read because of their heavy schedules." We long ago held, however, that briefings exactly like this are part of the Act's openness mandate, even if the briefing merely involves "the imparting of information about a matter, albeit unaccompanied by any discussion among the members of a public body ...." Compliance Board Opinion 93-6 (May 18, 1993), *reprinted in* 1 *Official Opinions of the Open Meetings Compliance Board* 35. We decline to revisit this issue; the public might well be keenly interested in learning the factual background presented to the decision makers in such a briefing. Moreover, line-drawing between the mere provision of information and the advancing of a point of view is often difficult at best. We hold that this aspect of the August 22 meeting was closed in violation of the Act.

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definition of public body a "local government's counterpart to the Governor's cabinet ...." §10-502(h)(3)(viii).

[9] Likewise, notwithstanding an exclusion, any discussion of the "granting [of] a license or permit" is covered by the Act. §10-503(b)(1).

We are pleased to note the County Attorney's additional statement that "the Commissioners have decided to meet in open session for such briefings in the future ...."

V

Conclusion

Given the inexact language of the Act and the complexities of the governmental process in Carroll County, we have sought to provide as much guidance as we feasibly can concerning the executive function exclusion from the Act. The basic point that emerges is this: If the County Commissioners wish to close a meeting when they have before them a legislative or other policy proposal, even in the earliest stages of development and even if it affects internal county operations only, or a zoning matter, even if they are simply getting a briefing, they may close the meeting only if they have a basis to do so under §10-508 of the Act and follow the procedures required for closing a meeting.

OPEN MEETINGS COMPLIANCE BOARD

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